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Supreme Court, Kings County, New York.  
 Juanita GHEE, Plaintiff,  
 v.

WASHINGTON MUTUAL BANK F.A., Wash-  
 ington Mutual, Inc., and Nydia Rodriguez, Defendants.  
 Aug. 21, 2006.

**Background:** Employee sued supervisor, alleging employment discrimination, sexual harassment, and battery. After unsuccessfully moving to dismiss for lack of personal jurisdiction, supervisor filed motion to dismiss for failure to state a cause of action.

**Holding:** The Supreme Court, Kings County, Arthur M. Schack, J., held that supervisor's second motion to dismiss violated the "single motion rule."

Motion denied.

West Headnotes

**[1] Pretrial Procedure 307A ↪675**

307A Pretrial Procedure

307AIII Dismissal

307AIII(B) Involuntary Dismissal

307AIII(B)6 Proceedings and Effect

307Ak675 k. Motion and Proceedings

Thereon. **Most Cited Cases**

Supervisor's motion to dismiss employee's claims of employment discrimination, sexual harassment, and battery, for failure to state a cause of action, filed after supervisor unsuccessfully moved to dismiss for lack of personal jurisdiction, violated the "single motion rule." **McKinney's CPLR 3211(a)(7, 8).**

**[2] Pretrial Procedure 307A ↪675**

307A Pretrial Procedure

307AIII Dismissal

307AIII(B) Involuntary Dismissal

307AIII(B)6 Proceedings and Effect

307Ak675 k. Motion and Proceedings

Thereon. **Most Cited Cases**

The "single motion rule" governing motions to dismiss exists to avoid wasting the limited resources and time of parties and court; successive motions to dismiss causes of action, without fitting into any of the limited exceptions, clog motion calendars and delay justice. **McKinney's CPLR 3211(a)(7).**

**\*\*508 Akin & Smith, LLC**, New York City, for Plaintiff.

Gallet Dreyer & Berkey LLP, New York City, for Defendant.

**ARTHUR M. SCHACK, J.**

**\*578** Defendant Nydia Rodriguez, in this action by plaintiff Juanita Ghee for alleged employment discrimination, sexual harassment, battery, and related causes of action for damages emanating from the above allegations, moves pursuant to **CPLR Rule 3211(a)(7)**, to dismiss the first seven of the eight causes of action in plaintiff's complaint for failure to state a cause of action.

Plaintiff correctly opposes this motion. The instant motion must be denied because it violates what Professor David Siegel, in N.Y. Prac. § 273, at 454-455 [4th ed.] and Practice Commentaries (McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211:55), calls the "Single Motion Rule."

**Background**

According to the complaint [exhibit A of motion], plaintiff started working at a Manhattan branch of Washington Mutual Bank in April 2004. Defendant Rodriguez was plaintiff's supervisor. The summons and complaint, both dated January 24, 2005, were filed with the Kings County Clerk on January 26, 2005. Defendant Rodriguez was ultimately served in North Miami, FL, in April 2005. Defendant Rodriguez moved, pursuant to **CPLR Rule 3211(a)(8)** to dismiss the complaint against her for failure of the plaintiff to have jurisdiction over her

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person. In my March 20, 2006 decision and order with respect to defendant Rodriguez's prior [CPLR Rule 3211\(a\)\(8\)](#) motion, [11 Misc.3d 1066\(A\)](#), [2006 N.Y. Slip Op. 50398\(U\)](#), [2006 WL 706472](#), I denied the motion to dismiss, holding at 5, that:

the substituted service on defendant Rodriguez, in Florida, on April 9, 2005, complied with the statutory requirements of [CPLR § 308\(4\)](#) for "due diligence."\*\*509 The plaintiff properly served defendant Rodriguez within 120 days of the filing of the summons and complaint, pursuant to [CPLR § 306\(b\)](#). Therefore, in the instant action, the Court has personal jurisdiction of defendant Rodriguez.

Subsequent to my denial of defendant Rodriguez's [CPLR Rule 3211\(a\)\(8\)](#) motion to dismiss, on May 11, 2006, defendant Rodriguez's made the instant motion, her second preanswer motion to dismiss, pursuant to [CPLR Rule 3211\(a\)\(7\)](#), for plaintiff's failure to state a cause of action. It should be noted that defendant Rodriguez's first motion to dismiss, for lack of jurisdiction, never sought as an additional form of relief, in the alternative, dismissal for plaintiff's failure to state a cause of action.

\*579 [CPLR Rule 3211\(e\)](#) states, in relevant part:

**(e) Number, time and waiver of objections; motion to plead over.** At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), *and no more than one such motion shall be permitted.* [emphasis added].

There are some limited exceptions to the general "single motion rule" for [CPLR 3211\(a\)](#) motions, but the instant motion, as will be discussed, does not fall under any of these exceptions. The Court has no choice but to dismiss the instant motion for its violation of [CPLR Rule 3211\(e\)](#) and the "single motion rule."

### Discussion

[1] In discussing the rationale for the "single mo-

tion rule" to dismiss causes of action, Professor Siegel, in *Practice Commentaries* (McKinney's Cons. Laws of N.Y., Book 7B, [CPLR 3211:55](#)), observed that:

There is no limitation stated on the number of motions that can be made to dismiss defenses under [CPLR 3211\(b\)](#). But it is provided that *there shall be but one motion to dismiss a cause of action under subdivision (a)*. And if there are several causes of action stated, this provision means that the movant must gather together all of his subdivision (a) objections, or such of them as he wants to take by motion, for use on that single [CPLR 3211](#) opportunity. This requirement has both procedural and administrative missions. It is designed to protect the pleader from being harassed by repeated [CPLR 3211\(a\)](#) motions and to spare the court's motion calendars the burden of a [CPLR 3211](#) motion more than once in the same case. [emphasis added]

Defendant Rodriguez's counsel, at p. 8, of his reply memorandum of law, makes a disingenuous and unmerited claim, that a second [CPLR 3211\(a\)](#) motion is permissible under paragraph 7. Counsel states "Siegel's *New York Practice* notes that: "It has been held, that a second motion is permissible if based on paragraph 7 (insufficiency of the claim)." [Siegel, New York Practice Section 273](#) (4th Ed.)." Counsel conveniently neglected to quote the rest of the sentence. That sentence, in its entirety, states: It has been held, however, that a second motion is permissible if based on paragraph 7 (insufficiency of the claim), *but the Court of Appeals seemed to assume otherwise in [McLearn v. Cowen & Co.](#)* [emphasis added].

[McLearn v. Cowen & Co.](#), 60 N.Y.2d 686, 468 N.Y.S.2d 461, 455 N.E.2d 1256 (1983) held differently with respect to the number of [CPLR Rule 3211\(a\)](#) motions to \*580 dismiss allowed, than the Court in \*\*510 [Higby Enterprises, Inc. v. City of Utica](#), 54 Misc.2d 405, 282 N.Y.S.2d 583 (Sup. Ct., Oneida County 1967), *affd.* 30 A.D.2d 1052, 295 N.Y.S.2d 428 (4th Dept. 1968). *Higby* is the case referred to above by defendant Rodriguez's counsel

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in Siegel's *N.Y. Prac.* and relied upon by defendant Rodriguez in the instant motion. However, the *McLearn* Court upheld the "single motion rule." See *Ancrum v. St. Barnabas Hospital*, 301 A.D.2d 474, 755 N.Y.S.2d 28 (1st Dept. 2003); *Facundo, S.A. v. Pressman*, 233 A.D.2d 117, 649 N.Y.S.2d 133 (1st Dept. 1996).

In *Held v. Kaufman*, 91 N.Y.2d 425, 671 N.Y.S.2d 429, 694 N.E.2d 430 (1998), the Court observed that an additional CPLR Rule 3211(a) motion may be made if a defendant's reply papers raise additional defenses. This has not occurred in the instant matter. The Court, at 430, observed, "[t]he purpose of CPLR 3211(e) is to prevent the delay before answer that could result from a series of motions' (Advisory Committee Notes following CPLR 3211, reprinted in N.Y. Cons. Law Serv., Book 4H, at 308 [1994] )." In *Klein v. Gutman*, 12 A.D.3d 417, 784 N.Y.S.2d 581 (2d Dept. 2004), a shareholder derivative action for fraud and breach of fiduciary duty, defendants Singer and Gutman made a third motion to dismiss the complaint. The Appellate Division affirmed Supreme Court, Kings County's denial of defendants' motion to dismiss, *inter alia*, for violation of the "single motion rule." The Court held, at 420:

Singer and Central's third motion to dismiss was properly denied by the Supreme Court not because the initial motion was withdrawn, but pursuant to the single-motion rule of CPLR 3211(e). CPLR 3211(e) permits only one preanswer motion and precludes successive motions (see *Held v. Kaufman*, 91 N.Y.2d 425 [671 N.Y.S.2d 429, 694 N.E.2d 430] [1998]; *Miller v. Schreyer*, 257 A.D.2d 358 [683 N.Y.S.2d 51] [1999] ). Here, the third motion to dismiss made by Singer and Central violated both the letter and the spirit of the single motion rule articulated by CPLR 3211(e).

If the instant matter is not resolved, defendant Rodriguez, may, after joinder of issue, seek summary judgment, pursuant to CPLR Rule 3212. See *Ancrum v. St. Barnabas Hospital*, *supra*; *Miller v. Schreyer*, *supra*; *Rich v. Lefkovits*, 56 N.Y.2d 276,

281-282, 452 N.Y.S.2d 1, 437 N.E.2d 260 (1982).

Professor Siegel, in *N.Y. Prac.* and McKinney's Practice Commentaries previously cited, enumerated the limited circumstances in which a defendant may make a second CPLR Rule 3211(a)(7) motion to dismiss. These include situations in which \*581 the first motion was premature (*Lemberg v. John Blair Communications, Inc.*, 258 A.D.2d 291, 685 N.Y.S.2d 435 [1st Dept. 1999]; *Fralely v. Desilu Productions, Inc.*, 23 A.D.2d 79, 258 N.Y.S.2d 294 [1st Dept. 1965] ), or if the first motion was aimed at a different pleading than the subsequent motion (*Nassau Roofing & Sheet Metal Co. Inc. v. Celotex Corp.*, 74 A.D.2d 679, 424 N.Y.S.2d 786 [3d Dept. 1980] ). These limited situations do not exist in the instant case.

[2] It is clear that the "single motion rule" exists to avoid wasting the limited resources and time of parties and the Court. Successive CPLR 3211(a)(7) motions to dismiss causes of action, without fitting into any of the limited exceptions, clog motion calendars and delay justice.

Defendant Rodriguez could have added the instant CPLR Rule 3211(a)(7) motion as an alternate relief sought in her prior motion to dismiss for violation of CPLR 3211(a)(8). This would have allowed the Court to have determined on the merits whether plaintiff stated a cause of action, after the Court decided that plaintiff had \*\*511 obtained jurisdiction over defendant Rodriguez. The use of the "single motion rule" in the instant case would have prevented the delay resulting from this motion and make a more economic use of court resources. Professor Siegel observed, in *N.Y. Prac.* § 273, at 454-455 [4th ed.], that the single motion rule "is designed to avoid duplication because the movant can join in the one motion whatever grounds she then has."

For this Court to reach the merits of defendant Rodriguez's instant CPLR 3211(a)(7) motion would reward defendant Rodriguez for violation of the "single motion rule" and further delay the instant action. Therefore, this Court will deny the instant

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motion without any analysis of each of the first seven causes of action in the instant complaint.

### *Conclusion*

Accordingly, it is

ORDERED, that the motion of defendant Rodriguez for an order, pursuant to [CPLR Rule 3211\(a\)\(7\)](#), to dismiss the first seven of the eight causes of action in plaintiff's complaint for failure to state a cause of action, is denied in its entirety.

This constitutes the Decision and Order of the Court.

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